

HEAD
& AMORY
v.
THE PROVIDENCE INSURANCE COMPANY.

sidered by the court that the judgment aforesaid be, for this cause, reversed, and annulled, and that the cause be remanded to the said circuit court to be again tried, with direction that the testimony, in the said record contained, does not amount to evidence of a contract concluded between the parties, and that the defendants do pay to the plaintiffs their costs.

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A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.

The act of the 9th of February, 1799, did not authorise the seizure upon the high seas of any vessel sailing from a French port; and the orders of the President of the United States could not justify such a seizure. Quere, whether probable cause will excuse from damages?

ON the 2d of December, 1799, the Danish brigantine *Flying Fish*, was captured, near the island of *Hispaniola*, by the United States frigates *Boston* and *General Greene*, upon suspicion of violating the act of Congress, usually termed the *non-intercourse law*, passed on the 9th of February 1799, Vol. 4. p. 244; by the 1st section of which it is enacted, "That from and after the first day of March next no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West-Indies, or elsewhere under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place, as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

And by the 5th section it is enacted,

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" That it shall be lawful for the President of the *United States*, to give instructions to the commanders of the public armed ships of the *United States*, to stop and examine any ship or vessel of the *United States* on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the *French* republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the *United States*; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures, as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of *March*, 1799, and are as follow :

" SIR—Herewith you will receive an act of Congress, further to suspend the commercial intercourse between the *United States* and *France*, and the dependencies thereof, the whole of which requires your attention. But it is the command of the President, that you consider particularly, the fifth section as part of your instructions, and govern yourself accordingly.

" A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the *United States* and those of *France* and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, *American*, and protected by *American* papers only; but you are to be vigilant that vessels or cargoes really *American*, but covered by *Danish* or other foreign papers, and bound to, or from, *French* ports, do not escape you.

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“ Whenever, *on just suspicion*, you send a vessel into port to be dealt with according to the aforementioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation.

“ At the same time that you are thus attentive to fulfil the objects of the law, *you are to be extremely careful not to harass, or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens.*”

In the *district court of Massachusetts*, the vessel and cargo were ordered to be restored, *without damages or costs*. Upon the question of damages, the honourable *Judge Lowell*, delivered the following opinion.

“ This libel is founded on the statutes of the *United States*, made to suspend the commercial intercourse between the *United States* and *France*, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants.

“ The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

“ The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by *Samuel Goodman*, a *Prussian* by birth, but now an inhabitant of the *Danish* island of *St. Thomas*; that the master was born in, and is now of the same island, but for several years had been employed in vessels of citizens of the *United States*, and sailed out of our ports; that he speaks our language perfectly, in the accent of an *American*, and has the appearance of being one. The mate is a citizen of the *United States*, born here, and having always continued such. The rest of the seamen are *Englishmen*, *Portuguese* and *Negroes*. The supercargo a *Frenchman*. The vessel had carried

" a cargo of provisions and dry-goods from *St. Thomas's*
 " to *Jeremie*, and was returning thither, loaded with
 " coffee, when captured. That during the chase by the
 " *American* frigates, the master threw overboard the
 " log-book, and certain other papers. That there was
 " on board a protest signed by the master, supercargo
 " and several seamen, in which they declared that the
 " vessel had been bound from *St. Thomas's* to *Port-au-*
 " *Prince*, and was compelled by *Rigaud's* vessels to go
 " into *Jeremie*, which was false and totally unfounded ;
 " and that after the capture, the master inquired of his
 " seamen whether they would stand by him respecting
 " this pretence.

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" That the statutes of the *United States* prohibiting
 " intercourse with *France* and its dependencies had been
 " long before known at *St. Thomas's*, and that it had
 " been since a common practice there to cover *American*
 " property for the purpose of eluding the law.

" If a war of a common nature had existed between
 " the *United States* and *France*, no question would be
 " made but the false papers found on board, the destruc-
 " tion of the log-book and other papers, would be a suffi-
 " cient excuse for the capture, detention and consequent
 " damages. It is only to be considered whether the
 " same principles as they respect neutrals are to be ap-
 " plied to this case.

" My mind has found much difficulty in settling this
 " question. It is one altogether new to me, and arises
 " from the peculiar imperfect war existing at this time
 " between the *United States* and *France*. I have embrac-
 " ed an opinion with much diffidence, and am happy
 " that it may be revised in the superior courts of the
 " *United States*.

" On what principles is the right of belligerent powers
 " to examine neutral vessels, and the duty of neutrals
 " to furnish their ships with proper papers, and to avoid
 " such conduct as may give cause to suspect they are
 " other than they pretend to be, founded? Do they not
 " necessarily result from a compromise of their respec-
 " tive rights in a state of war? Neither of the belliger-

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"ent powers have an original and perfect right to capture the property of neutrals, but they have a right, unless restrained by treaty, however disguised or covered by the aid of neutrals.† It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages has been, on the one hand to exercise, and on the other to prevent this examination, and to establish a principle that neutral vessels shall be furnished with the usual documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention, except the eventual condemnation of the property; and even this, by some writers has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation, which confer these rights or impose these duties. They are the result of common practice, long existing, often recognized, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

"It does not appear to me to be material what is the nature of the war, general or limited. Nothing can be required of neutrals but to avoid duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary to attach to them the duties, and to belligerent nations the rights resulting from a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of *St. Thomas*, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the *United States* had prohibited intercourse, and having had long and full knowledge of the state of things, its inhabitants were,

† It is believed that there has been an error in copying this passage. It is, however, printed verbatim from the transcript of the record.—The words to be supplied probably are, "to search for and seize the property of their enemies" to be inserted after the word "treaty."

“ as I conceive, bound not to interfere or attempt to
 “ defeat the measures taken by our government in their
 “ limited war. We find, however, that these attempts
 “ have been frequent; that *American* vessels have, in
 “ many instances, been covered in that island, and the
 “ trade which our government has interdicted, has been
 “ thus carried on. It behoved, then, those of its inhab-
 “ itants who would avoid the inconveniences of restraint
 “ to act with openness, and avoid fraud and its appear-
 “ ances.

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“ This construction of the state in which the *United*
 “ *States* are, (although I am of opinion that, abstracted-
 “ ly from other considerations, it would give them the
 “ rights of belligerent powers) places the neutral powers
 “ in no new predicament, nor imposes the necessity of
 “ any new documents, or other conduct than they were
 “ obliged to from the pre-existing state of war between
 “ most of the great naval powers.

“ On the whole I am of opinion that no damages are
 “ to be paid the claimants for the capture and detention,
 “ and do so decree, and that each party bear their own
 “ costs.”

From this decree the claimants appealed to the Circuit
 Court, where it was reversed and 8,504 dollars damages
 were given.

The following is the decree of the Circuit Court.

“ This Court having fully heard the parties on the
 “ said appeal, finds the facts stated in the said decree to
 “ be true, and that the said *Little* had instructions from
 “ the President of the *United States*, on which the action
 “ in the said libel is founded, a copy of which instruc-
 “ tions is on file. And it further appearing that the said
 “ brigantine and her cargo were *Danish* and neutral
 “ property, and that the said *George Little* knew that the
 “ said brig at the time of the said capture was bound and
 “ sailing from *Feremie* to *St. Thomas's*, a *Danish* and
 “ neutral port, and not to any *French* port; This court
 “ is of opinion that although Captain *Little* had a right to
 “ stop and examine the said brig, in case of suspecting

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"her to be engaged in any commerce contrary to the act of the 9th of *February* 1799, yet that he was not warranted by law to capture and send her to a port of the *United States*. That it was at his risque and peril if the property was neutral; and that a probable cause to suspect the vessel and cargo *American* will not, in such case, excuse a capture and sending to port.

"It is, therefore, considered, adjudged, and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs."

The damages being assessed by assessors appointed by the Court, a final sentence was pronounced, from which the captors appealed to this Court.

The cause was argued at *December* term 1801, by *Dexter* for the appellants, and by *Martin* and *Mason* for the claimants.

February 27. MARSHALL, Chief Justice, now delivered the opinion of the Court.

The *Flying-Fish* a *Danish* vessel having on board *Danish* and neutral property, was captured on the 2d of *December* 1799, on a voyage from *Jeremie* to *St. Thomas's*, by the *United States* frigate *Boston*, commanded by Captain *Little*, and brought into the port of *Boston*, where she was libelled as an *American* vessel that had violated the non-intercourse law.

The judge before whom the cause was tried, directed a restoration of the vessel and cargo as neutral property, but refused to award damages for the capture and detention, because in his opinion, there was probable cause to suspect the vessel to be *American*.

On an appeal to the circuit court this sentence was reversed, because the *Flying-Fish* was on a voyage from, not to, a *French* port, and was therefore, had she even been an *American* vessel, not liable to capture on the high seas.

During the hostilities between the *United States* and *France*, an act for the suspension of all intercourse between the two nations was annually passed. That under which the *Flying-Fish* was condemned, declared every vessel, owned, hired or employed wholly or in part by an *American*, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the *French* republic, to be forfeited together with her cargo; the one half to accrue to the *United States*, and the other to any person or persons, citizens of the *United States*, who will inform and prosecute for the same.

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The 5th section of this act authorises the president of the *United States*, to instruct the commanders of armed vessels, "to stop and examine any ship or vessel of the *United States* on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound or sailing to any port or place within the territory of the *French* republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the *United States* for adjudication.

It is by no means clear that the president of the *United States* whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the "act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the *United States*; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a *French* port, the legislature seem to have prescribed

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that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a *French* port. Of consequence, however strong the circumstances might be, which induced captain *Little* to suspect the *Flying-Fish* to be an *American* vessel, they could not excuse the detention of her, since he would not have been authorised to detain her had she been really *American*.

It was so obvious, that if only vessels sailing to a *French* port could be seized on the high seas, that the law would be very often evaded, that this act of congress appears to have received a different construction from the executive of the *United States*; a construction much better calculated to give it effect.

A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause. "A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the *United States*, and those of *France* or her dependencies, where the vessels *are apparently as well as really American*, and protected by *American* papers only, but you are to be vigilant that vessels or cargoes *really American*, but covered by *Danish* or other foreign papers, and bound to or from *French* ports, do not escape you."

These orders given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause

which existed to induce a suspicion that the vessel was *American*, would excuse the captor from damages when the vessel appeared in fact to be neutral:

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I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.

It becomes therefore unnecessary to inquire whether the probable cause afforded by the conduct of the *Flying-Fish* to suspect her of being an *American*, would excuse Captain *Little* from damages for having seized and sent her into port, since had she actually been an *American*, the seizure would have been unlawful?

Captain *Little* then must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by council before the proper tribunal, this court can receive no objection to it.

There appears then to be no error in the judgment of the circuit court, and it must be affirmed with costs.